CHAPTER 3. ELECTIONS

Read Article II, § 4; Article III, §§ 10 & 17; Article IV, §§ 1-4, 11-12; and Article VI, § 43.

A. Right to Equal Representation

STATE EX REL. SMITH v. GORE,
150 W. Va. 71, 143 S.E.2d 791 (1965).

CAPLAN, Justice:

In this original proceeding in mandamus, instituted in this Court on July 13, 1965, the petitioner, Hulett C. Smith, Governor of the State of West Virginia, seeks a writ to compel the respondent, Truman E. Gore, Commissioner of Finance and Administration, to affix his signature to certain contracts requiring the expenditure of state funds which have been entered into by and between the petitioner and certain publishers of newspapers throughout the state. Upon application of the petitioner this Court granted a rule returnable July 20, 1965, at which time the respondent filed his answer to the petition. [Subsequently, citizens and taxpayers were permitted to intervene.] . . .

This proceeding raises the question of the constitutionality of Chapter 18, Acts of the Legislature, Regular Session, 1965, hereinafter sometimes referred to as the Act. Enacted on March 13, 1965, this Act provides for the calling of a convention having the authority to alter the state constitution. Article 2, Section 1 thereof provides for an election throughout the state for the purpose of taking the sense of the voters on the question of calling a convention having the authority to alter the constitution of the state. Section 2 of said Article 2 requires the Governor to cause a notice of such election to be published one time at least three months before the election in some newspaper of general circulation published in each county of the state. . . .

On July 12, 1965, the petitioner forwarded [contracts for publishing the newspaper notice] to the respondent and requested that he affix his signature thereto[.] . . . By letter of the same date, addressed to the petitioner, the respondent refused to sign the contracts, stating, as the reason for his refusal, that he believed the proposed constitutional convention, as provided for in the Act, to be unconstitutionally apportioned and that such expenditure of state funds would therefore be improper. This action was then instituted to compel the respondent to comply with [the Governor's directive.]

It is the position of the petitioner that nothing in our constitution or laws requires equal apportionment of delegates to a constitutional convention and that the Act is therefore constitutional. The respondent and intervenors, on the other hand, contend that equal apportionment of such delegates is an absolute requirement of our constitution; that the proposed convention is unequally apportioned; and that the Act is therefore unconstitutional.

On July 27, 1965, this Court entered an order in this proceeding holding Chapter 18, Acts of the Legislature, Regular Session, 1965, unconstitutional and that the petitioner was not entitled to the writ of mandamus prayed for in his petition. This opinion is now filed for the purpose of stating the reasons for the holdings in the aforesaid order.

It is undisputed that mandamus is the proper remedy in this proceeding. The only question for decision, therefore, is whether it is necessary, under our constitution and laws, to provide for equal representation in the election of delegates to a constitutional convention.

The provision of the Act which gives rise to this controversy is Article 3, Section 3 thereof, entitled "Number of Members to be Elected; Apportionment." That section provides that the constitutional convention shall consist of one hundred six members and purports to apportion such members among the several counties. Thereunder each county in the state is entitled to at least one delegate to the convention, with the more populous counties, in most instances, being allocated a greater number. It is readily conceded by the petitioner that Article 3, Section 3 of the Act does not provide equal representation of the general populace to the convention, his position being, as heretofore noted, that equal representation to a constitutional convention is not required. This

concession makes it unnecessary to cite examples of the many instances of inequality in the purported apportionment of delegates to such convention.

The sole issue presented for decision in this proceeding is resolved by the consideration and application of Article II, Section 4 of the Constitution of West Virginia, which reads as follows: "Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved."

That constitutional provision is clear and unambiguous in its meaning. It provides that every citizen shall have equal representation in government. However, the framers of this provision did not stop there. They went on to say "and, in all apportionments of representation, equality of numbers * * *, shall * * * be preserved." We do not see the last quoted portion, as suggested by the petitioner, to be a mere modification of or subordinate to the first clause so that it would apply only to apportionments of representation in government. Rather, it is an independent clause which clearly requires equality in all apportionments of representation whether such apportionments of representation be in a governmental body, in its strict sense, or otherwise.

The petitioner contends that equal representation is required only in government; that government consists of the legislative, executive and judicial branches; and that since a constitutional convention does not fit into any of those categories, equal representation therein is not necessary. With this contention we do not agree. In view of the clear language of the constitution quoted above, "and, in all apportionments of representation", we find it unnecessary to categorize a convention as a part of government in holding that equal representation therein is required. Even though a constitutional convention may not precisely fit into one of the three recognized branches of government, it is such an essential incident of government that every citizen should be entitled to equal representation therein. Clearly, this was the intention of the framers of the present constitution when they formulated Article II, Section 4 thereof. . . .

We believe that Article II, Section 4 of our Constitution is clear in its terms and that the intention thereof is manifest from the language used. It provides for equal representation in government and, additionally, in all apportionments of representation. The manner in which representation in the legislature shall be apportioned is specifically prescribed in Article VI of the Constitution. Therefore, the second clause of Article II, Section 4, "and, in all apportionments of representation", refers to something other than the legislature. That an apportionment of representation was intended by the legislature is evident from the language contained in Article 3, Section 3 of the Act. It reads: "The constitutional convention shall consist of one hundred and six members, who shall be apportioned among the several counties as follows: * * *." It then proceeds to allocate to the various counties delegates to the convention without regard to the provisions of Article II, Section 4 of our Constitution which requires equality of numbers in all apportionments of representation.

This action constitutes a violation of Article II, Section 4 of the West Virginia Constitution and compels us to hold that Chapter 18, Acts of the Legislature, Regular Session, 1965, is unconstitutional. To arrive at the proper manner in which delegates to the convention should have been apportioned we need only to look at the Acts of the Legislature of 1871. Chapter 95 of said Acts, calling a constitutional convention, provided for apportionment of delegates thereto as follows: "13. Each county and delegate district, as may be prescribed by law at the time of holding said election, shall elect the same number of delegates, respectively, as they may be entitled to elect as delegates to the House of Delegates, and each senatorial district, as may be prescribed by law at the time of holding said election, shall elect two delegates." This section was written under a constitutional provision identical to Article II, Section 4 of the present constitution. Thus, it is evident that the 1871 Legislature felt constrained, under the constitution, to apportion delegates to the constitutional convention in the same manner as delegates to the legislature were apportioned. This manner of apportionment should have been provided for in Article 3, Section 3 of the 1965 Act.

A further assertion of the petitioner is that equality of representation in a constitutional

convention is not necessary for the reason that a convention merely formulates and proposes a constitution and the people have the opportunity to vote on such proposal. First, this is no answer to the plain requirements of Article II, Section 4 of our Constitution. Furthermore, the mere right to approve or disapprove a proposed constitution does not afford to the general public a voice in the formulation thereof. The people are entitled to equal representation when it is determined what that solemn document shall contain, not merely to a bare right of veto.

A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law. This basic organic law can be altered or rewritten only in the manner provided for therein. Under the provisions of Article XIV of the West Virginia Constitution this can be accomplished by the legislature or by a convention. In relation to the alteration of the constitution, each of such entities has identical powers and duties. Each may formulate and present for a vote of the people proposed alterations of the constitution. In either case, until the people act such proposals have no force or effect of law.

Thus, it is readily apparent that delegates to a constitutional convention are charged with a tremendous responsibility. They are not mere members of a committee designated by the legislature to formulate changes in the constitution. They are elected representatives of the people. These delegates are required to take the same oath of office as that administered to other state officials. They are paid with public funds and perform a public function. The convention to which these delegates are elected does more than make a mere proposal to the people. It formulates and determines what the constitution shall contain. If such convention is malapportioned, resulting in unequal representation, the people can have no equal voice in the formulation of the fundamental law which they are called upon to enact. The bare right to adopt or veto a proposal does not afford equal representation in the convention as contemplated by Article II, Section 4 of our Constitution. Therefore, this contention is without merit. . . .

For the reasons stated the writ prayed for by the petitioner is denied.

B. Right to Vote

NOTE

[Excerpted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 137-38 (2nd ed., Oxford University Press, 2016).]

Article IV, § 1 sets forth the basic right to vote and the qualifications for voting. A 1994 amendment dropped provisions that excluded women and paupers and reduced the durational residency requirements from one year in-State and sixty days in-county to thirty days for both. Each of the 1994 changes was designed to bring § 1 into compliance with federal constitutional developments of this century, including the Nineteenth Amendment (extending the right to vote to women) and various Supreme Court decisions. The amendment may have overlooked one additional problem, however. If the last clause is read to disqualify any servicemen stationed in the State who would otherwise qualify as "residents," then that clause violates federal equal protection law as set forth in Carrington v. Rash (U.S. 1965).

Thus, as presently written, § 1 confers the franchise on all citizens except those under one or more of the specified disabilities: under the age of 18 (the Twenty-sixth Amendment to the U.S. Constitution sets the age); mental incompetency determined by a court; less than thirty days residence in either the State or the county of residence; or under a felony conviction. Individuals excluded by a conviction may regain voter eligibility when their "disability" expires--that is, upon completion of their punishment. Osborn v. Kanawha County Court (1910).

The voter qualifications in § 1 assume additional importance because Article IV, § 4 makes entitlement to vote a prerequisite to eligibility for elected or appointed office in the State. Thus,

voter qualifications necessarily become candidacy qualifications, and the West Virginia Supreme Court has held the two sections must be read in pari materia. Marra v. Zink (1979).

C. Rights of Candidacy

STURM V. HENDERSON,
176 W.Va. 319, 342 S.E.2d 287 (1986).

McHUGH, Justice:

This action is before this Court upon the appeal of Donald E. Henderson from the February, 1985 order of the Circuit Court of Upshur County, West Virginia. Pursuant to that order, the appellant was removed from his office as member of the Board of Education of Upshur County. . . .

I

In this State, county boards of education are statutory entities with functions of a public nature. Evans v. Hutchinson, 158 W.Va. 359, 214 S.E.2d 453 (1975). They are each composed of five members elected upon a nonpartisan basis by the voters of the respective county. [See W. Va. Code 18-5-1, et seq.]

Members of county boards of education are elected, at primary elections, for six-year, staggered terms. . . . They must be residents of the county in which they seek office.

Brought into question in this action is the further requirement that "[n]o more than two members [of a county board of education] shall be elected from the same magisterial district." W.Va.Code [18-5-1 and 3-5-6]. . . .

[Pursuant to [W.Va.Code 7-2-2], the counties of this State are laid off into magisterial districts, which districts (to be not less than three nor more than ten in number for each county) are required to be "as nearly equal as may be in territory and population."...

II

The appellant lived in Upshur County and was a member of the Board of Education of Upshur County. His term expired in July, 1984. The magisterial district in which he resided was Union District. Also residing in Union District was Gary Frush, another board member. Board member John Tenney was a resident of nearby Washington District. The terms of office of Frush and Tenney did not expire until after 1985.

The County Commission of Upshur County, in 1983, reduced the magisterial districts of the county from six to three. The new districts were known as the First, Second and Third Districts. As a result of the redistricting, the residences of the appellant, Gary Frush and John Tenney were in the Second District.

In view of the incumbency of Frush and Tenney, and the statutory provisions set forth above, the appellant attempted to change his residence to the Third District, in which district only one other board member resided. By county-wide vote in the June, 1984 primary, the appellant was elected to the board as resident of the Third District. As the parties have stipulated, the appellant "received the largest number of votes [of] any candidate" running for membership upon the board. The appellant assumed the office in July, 1984.

Thereafter the appellees (as residents, taxpayers and registered voters of Upshur County) filed an action in the Circuit Court of Upshur County seeking the removal of the appellant from office. An evidentiary hearing upon the action was conducted.

Ruling in favor of the appellees, the circuit court concluded (1) that the appellant, in fact, resided in the Second District, rather than the Third District, and (2) that the statutory requirement, that no more than two members of a county board of education shall be elected from the same magisterial district, was constitutional. Thus, the circuit court ordered that the appellant be removed from office.

III

In this appeal, the appellant does not contest the conclusion of the circuit court that, during the period in question, he resided in the Second District of Upshur County, rather than in the Third District. . . . Rather, the appellant brings into question the constitutionality of the requirement, reflected in W.Va.Code, 18-5-1 [1945], and W.Va.Code, 3-5-6 [1978], that no more than two members of a county board of education shall be elected from the same magisterial district. For the reasons set forth below, we conclude that the requirement is unconstitutional.

As this Court has recognized, the right to become a candidate for public office is a fundamental right, and restrictions upon that right are subject to constitutional scrutiny. Garcelon v. Rutledge, 173 W.Va. 572, 574, 318 S.E.2d 622, 625 (1984); Marra v. Zink, 163 W.Va. 400, 404, 256 S.E.2d 581, 584 (1979); syl. pt. 1, State ex rel. Piccirillo v. City of Follansbee, 160 W.Va. 329, 233 S.E.2d 419 (1977); State ex rel. Brewer v. Wilson, 151 W.Va. 113, 121-22, 150 S.E.2d 592, 597 (1966), overruled upon other grounds in Marra, supra, 163 W.Va. 400, 408, 256 S.E.2d 581, 586.

The Constitution of West Virginia contains no express mandate which restricts, in terms of magisterial districts, the election of a candidate to a county board of education. There is no such restriction in the Constitution of the United States. Rather, our state constitution provides that "[n]o person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office...." W.Va.Const. art. IV, § 4. Moreover, W.Va.Const. art. IV, § 8, provides that "[t]he legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."

By contrast, the Constitution of West Virginia contains an express "magisterial district restriction" with respect to county commissioners. As provided by W.Va.Const. art. IX, § 10: "The commissioners shall be elected by the voters of the county, and hold their office for a term of six years, ... but no two of said commissioners shall be elected from the same magisterial district." ...

Similarly, the Constitution of West Virginia contains an express restriction with regard to the election of senators of the Legislature of West Virginia. Pursuant to W.Va.Const. art. VI, § 4, this State was divided into senatorial districts for the election of such senators. That provision further states that "[e]very district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county." ...

Unlike the situations involving county commissioners and senators of the state legislature, the Constitution of West Virginia contains no comparable restriction with regard to the election of a candidate to a county board of education. Rather, the "magisterial district restriction" before this Court is statutory and must be viewed in light of W.Va. Const. art. IV, § 4, and W.Va. Const. art IV, § 8.

In Marra v. Zink, supra, a Clarksburg, West Virginia, city charter provision, which required candidates for city council to be city residents for one year prior to nomination, was declared by the Circuit Court of Harrison County, West Virginia, to be unconstitutional. This Court affirmed and stated in the Marra opinion:

> [A]lthough W.Va. Const., art. 4 § 8 provides authority for the Legislature to establish by general law 'terms of office, powers, duties, and compensation of all public officers and agents, and the manner in which they shall be elected ...' that constitutional section does not provide for the establishment of qualifications. * * * [Thus, we] hold that W.Va. Const., art. 4 § 4 is the exclusive constitutional authority for the establishment of qualifications for municipal office and any qualifications in excess of that provision cannot be created by general law under authority of W.Va. Const., art. 4 § 8 nor under the Legislature's plenary law making power. . . .

Moreover, this Court recognized in Marra that "[t]he law has been moving very rapidly in the direction of removing all unreasonable barriers to elective office through the use of constitutional

provisions other than W.Va. Const., art. 4 § 4."[6]

. . . [W]e find the constitutional analysis of Marra persuasive and applicable to this appellant's quest for board membership. As in the case of the durational residency requirement of Marra, we find the "magisterial district restriction" before us in this action to be "in excess" of the qualifications for office authorized by the Constitution of West Virginia. In particular, we hold that W.Va.Code, 18-5-1 [1945], and W.Va.Code, 3-5-6 [1978], to the extent that they contain a provision that no more than a certain number of members of a county board of education "shall be elected from the same magisterial district," are in conflict with W.Va. Const. art. IV, § 4, and W.Va. Const. art. IV, § 8, concerning the qualifications of candidates for certain public offices, and are, therefore, unconstitutional.

In so holding, we are not unmindful of the language set forth in W.Va. Const. art. II, § 4, that "[e]very citizen shall be entitled to equal repesentation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." We do not perceive, however, that such constitutional principle is advanced by the qualification "tied to residence" established under [W.Va.Code, 18-5-1 & 3-5-6. Marra.] A county commission "is [ordinarily] given broad powers in redistricting the county ...," syl. pt. 3, Wilson v. County Court of Logan County, 150 W.Va. 544, 148 S.E.2d 353 (1966), which redistricting may often render ineligible, under [W.Va.Code 18-5-1 & 3-5-6], otherwise qualified candidates seeking membership upon a county board of education. Board members are currently elected by county-wide vote and will continue to be so elected in the absence of the "magisterial district restriction." We believe that our holding, that the restriction is unconstitutional, will facilitate equality of representation upon county boards of education and will protect the fundamental right to be a candidate for public office. ...

Accordingly, upon all of the above, the order of the Circuit Court of Upshur County, removing the appellant from his office as member of the Board of Education of Upshur County, is hereby reversed . . ..

NOTES

1. State ex rel. Piccirillo v. Follansbee, 160 W.Va. 329, 233 S.E.2d 419 (1977). The Court, through Justice Miller, held the right to candidacy is a fundamental right guaranteed by Article III, §§ 7, 16, and 17 and thus cannot be restricted except upon a showing that the challenged provision serves a compelling state interest. Accordingly, the Court struck down a requirement that candidates for municipal offices must have been assessed and paid taxes upon at least one hundred dollars worth of real or personal property in the preceding year.

2. Marra v. Zink, 163 W.Va. 600, 256 S.E.2d 581 (1979). As noted in Sturm, the Court in Marra invalidated a city charter provision requiring candidates for city council to have been residents of the city for at least one year. Justice Neely's opinion for the Court specifically overruled the holding in State ex rel. Thompson v. McAllister, 38 W.Va. 485, 18 S.E. 770 (1893), that Article IV, § 4's listing of eligibility criteria for public office did not preclude imposition of other requirements. Barring a compelling interest or some other specific constitutional support, neither the State nor local

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[6]This Court's opinion in Marra v. Zink, supra, further states that:

[S]ince there is no direct authority in our Constitution for the Legislature to establish qualifications for office in excess of those imposed by W.Va. Const., art. 4, § 4, we find qualifications other than those in art. 4, § 4 unconstitutional by its very terms and under our own equal protection ... [due process and freedom of speech and assembly] provisions. . . .

governments can enact additional eligibility limits on candidates. That result followed, Neely said, from evolving principles of free speech and equal protection and had a firm basis in W. Va. Constitution, Art. III, §§ 3, 7, 10, and 17. The Court then concluded that the City's one year durational residency requirement failed to meet either rationality or compelling state interest standards.

3. State ex rel. Bromelow v. Daniels, 163 W.Va. 532, 258 S.E.2d 119 (1979). In an opinion by Justice Miller, the Court followed the Marra and Piccirillo holdings and invalidated eligibility criteria for the offices of village mayor and recorder that required the candidate to file written evidence of bondability.

4. Although the line of cases through Sturm establishing candidacy as a fundamental right remains good law, the specific holding in Sturm -- regarding limits based on magisterial district residency -- has been overruled by the 1986 ratification of the following revision of W. Va. Constitution Article XII, § 6:

> The school districts into which the state is now divided shall continue until changed pursuant to act of the Legislature: Provided, That the school board of any district shall be elected by the voters of the respective district without reference to political party affiliation. No more than two of the members of such board may be residents of the same magisterial district within any school district.

D. Ballot Access

WEST VIRGINIA LIBERTARIAN PARTY V. MANCHIN, 165 W.Va. 206, 270 S.E.2d 634 (1980).

MILLER, Justice:

The petitioners in this original mandamus proceeding – the West Virginia Libertarian Party; the 1980 West Virginia Socialist Workers Campaign Committee; Tom Moriarty, the Socialist Workers' gubernatorial candidate; and John B. Anderson – challenge the constitutionality of various provisions of the West Virginia Code which govern their access to the ballot for the 1980 general election.

The petitions were filed with this Court on April 30, 1980. On May 6, we granted a rule to show cause, making the return date for full argument May 20. Shortly before the date of full argument, petitioner John B. Anderson was permitted to intervene.

The challenges to our State election statutes are constitutional in nature. First, W.Va.Code, 3-5-8(a), relating to filing fees, is claimed to be a violation of the Equal Protection Clauses of our State and Federal Constitutions because it denies ballot access to candidates unable to pay the filing fee. Second, W.Va.Code, 3-5-23, is attacked because it purportedly denies the fundamental right of access to the ballot by an independent candidate not aligned with a political party. A third challenge is made to the same statute on the basis of its requirement that persons circulating nominating petitions must reside in the same magisterial district as persons who sign the petitions.

The fourth challenge is also directed against W.Va.Code, 3-5-23, and centers on its requirement that persons soliciting signatures on a nominating petition must first obtain a credentials certificate. Another complaint is lodged against the provision of this statute which disqualifies those persons signing a nominating petition from voting in the primary election. This complaint is coupled with the final claim relating to W.Va.Code, 3-5-24, which sets the filing deadline for nominating petitions as the day before the primary election. Petitioners contend that these provisions, either separately or in their combined effect, constitute an undue burden on ballot access.

This Court has not had recent occasion to consider the West Virginia statutes relating to third-party candidates. In Cunningham v. Cokely, 79 W.Va. 60, 90 S.E. 546 (1916), we dealt with a forerunner to W.Va.Code, 3-5-23, and found its requirement not to be an undue restriction on ballot access for

a minor political party. There, the Prohibition Party had sought ballot access by way of a State nominating convention. Our then-existing statute did not permit this procedure for a minor political party which had not obtained 5% of the total vote for Congressman at the last general election. The Prohibition Party had not obtained this vote in the preceding general election. The statute, however, enabled third-party candidates to obtain ballot access through signature petitions representing 5% of the voters participating in the last election for the office sought, and we found this to be sufficient.

During the past ten years, the United States Supreme Court has entered the field of ballot access in a rather dramatic fashion, and it is its decisions, predicated on constitutional provisions made binding on the states, that we must apply.

I

FILING FEES

The petitioner West Virginia Libertarian Party (WVLP) is attempting to sponsor Edward Clark for President, David Koch for Vice President, and Jack Kelly for Governor in the 1980 general election. The West Virginia Socialist Workers Campaign Committee (WVSWCC) is attempting to sponsor Andrew Pulley, Matilda Zimmerman and Tom Moriarty as its candidates for President, Vice President and Governor, respectively. All of these candidates assert they are unable to pay the filing fee for their respective office.

W.Va.Code, 3-5-8(a), mandates a filing fee for the offices of President, Vice President and Governor "equivalent to one percent of the annual salary of the office." W.Va.Code, 3-5-23(a), regulating the petition procedure for the nomination of candidates by third parties, requires the candidate in advance of obtaining the petition signatures to file a declaration of his candidacy and "pay the filing fee required by law." Thus, ballot access for all candidates is predicated on the payment of the filing fees under W.Va.Code, 3-5-8.

The United States Supreme Court in Lubin v. Panish, 415 U.S. 709 (1974) and Bullock v. Carter, 405 U.S. 134 (1972), recognized that the requirement of a filing fee for placement on the ballot fulfills a legitimate state interest-that of deterring frivolous candidacies. Underlying this interest is the desire to limit the size of the ballot in order to avoid voter confusion and to further avoid the increased possibility of runoff elections.

Lubin and Bullock also acknowledged a countervailing interest that open access to the ballot plays a vital role in giving an opportunity to candidates and voters to espouse various political and social viewpoints-an essential part of the right of free expression guaranteed by the First Amendment. See Williams v. Rhodes, 393 U.S. 23 (1968).

In an attempt to reconcile these competing interests, Bullock and Lubin determined that a state could not condition ballot access solely upon the payment of a filing fee. In Bullock, the Court invalidated filing fees as high as $9,000, which were later termed in Lubin as "patently exclusionary." ... Bullock involved a Texas statute that provided no reasonable alternative means of testing the strength of public support for a candidate. In Lubin, the Court struck down a California statute which required the payment of a much more modest sum--approximately $700--but nevertheless an amount the candidate could not pay. Significantly, the California statute also provided no alternative procedure for satisfying the legitimate state interest of gauging the depth of the candidate's public support. Lubin made clear that a petition requirement was such an alternative:

> "States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. . . . Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the 'seriousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf. The point, of course, is that ballot access must be genuinely open to all, subject to reasonable requirements. . . .
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> We addressed a related issue in State ex rel. Piccirillo v. City of Follansbee, W.Va., 233 S.E.2d

419 (1977), and determined that the right to file for public office is a fundamental right under our Equal Protection Clause, Article III, Section 17 of the West Virginia Constitution, and that a statute imposing a $100 property ownership requirement on candidates was unconstitutional. However, Bullock, Lubin and Piccirillo cannot be read to abrogate all filing fee requirements. Their teaching is that as to those candidates who cannot pay the filing fee, some alternative mode of gaining access to the ballot must be provided, such as petitions containing voter signatures.

Under W.Va.Code, 3-5-8, there is no mechanism for ballot access except the payment of the filing fee. In light of the Equal Protection Clause principles set out in Bullock and Lubin, we conclude that the failure to provide a reasonable alternative to filing fees for impecunious candidates to obtain access to the ballot renders the filing fee requirement of W.Va.Code, 3-5-8, unconstitutional as to such candidates. The State may not require, therefore, the payment of the filing fee by the candidates of the WVLP and WVSWCC.

II
RESTRICTION OF BALLOT TO CANDIDATES OF POLITICAL PARTIES

Intervenor John B. Anderson complains that W.Va.Code, 3-5-23, precludes an independent candidate from seeking petition signatures in order to have his name placed on the ballot. This disability arises from the statute's requirement that the candidate's declaration of candidacy must contain "the name of the political party he ... propose(s) to represent, its platform, principles or purposes." (§ 3-5-23(a)).

In Storer v. Brown, 415 U.S. 724 (1974), the Supreme Court held that ballot access may not be limited to candidates of political parties, but must be extended to independent candidates as well:

> "(T)he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under (state) law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not." . . .
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> There seems to be little doubt that under Storer, [§ 3-5-23] is constitutionally infirm in its failure to permit an independent candidate without political party affiliation to seek petition signatures.
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> We, therefore, hold that [§ 3-5-23] violates the Equal Protection Clause of both the United States and the West Virginia Constitutions to the extent that it fails to extend to the independent candidate the same right to ballot access as that of the political party candidate.

III
MAGISTERIAL DISTRICT RESTRICTIONS

The provisions of W.Va.Code, 3-5-23(b) and (c) under attack in this case relate to the requirement that the person soliciting signatures on the candidate's petition must do so within the magisterial district in which he resides and that only voters residing in that same magisterial district may sign the petition.[7]

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[7]The material portion of W.Va.Code, 3-5-23(b), provides:

"The person or persons soliciting or canvassing signatures of duly qualified voters on such certificate or certificates, shall be residents and qualified, registered voters, of the magisterial district of the county in which such solicitation or canvassing is made, and may solicit or canvass duly registered voters resident within their own respective magisterial

The majority of the United States Supreme Court decisions that relate to this question involved state statutes imposing some type of voter distribution requirement. These laws generally required the candidate to obtain a minimum number of signatures from specified political subdivisions of the state. Ordinarily, an attack was made under equal protection principles with the third party or independent candidate claiming that the requirement created a burden not supported by any compelling state interest. E.g., Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Moore v. Ogilvie, 394 U.S. 814 (1969); Communist Party of Illinois v. State Board of Elections, 518 F.2d 517 (7th Cir. 1975). . . .

The above cases dealt with various Illinois election statutes. In Moore, the Court struck down the requirement that a third party candidate for statewide office obtain petition signatures of at least 200 qualified voters in each of at least fifty of the state's counties. Socialist Workers Party involved a requirement that third-party candidates in Chicago obtain petition signatures equal to 5% of the number of persons voting in the last election, or approximately 36,000 signatures, while by candidates for statewide office had to secure only 25,000 signatures. This disparity was held to be violative of equal protection principles because the state could not show any compelling interest for requiring a candidate for city office to obtain a higher number of signatures than a statewide candidate. Communist Party of Illinois overturned a requirement that not more than 13,000 of the 25,000 signatures could be obtained in a single county.

In the wake of Moore v. Ogilvie, supra, lower federal courts have invalidated a number of voter distribution requirements for candidate nominating petitions. . . .On the other hand, a few decisions have upheld voter distribution requirements. See Udall v. Bowen, 419 F.Supp. 746 (S.D.Ind.1976) (three- judge court), aff'd mem., 425 U.S. 947 Zautra v. Miller, 348 F.Supp. 847 (D.Utah 1972) (three-judge court); Moritt v. Governor of New York, 42 N.Y.2d 347, 397 N.Y.S.2d 929, 366 N.E.2d 1285 (1977), appeal dismissed, 434 U.S. 1029 (1978). In Udall and Moritt, the distribution provision required a certain number of signatures from substantially equal congressional districts. One difficulty with any geographic distribution requirement is that it discriminates against candidates who represent geographically concentrated constituents, giving an effective veto of ballot access to an insular minority. See, e.g., [L.Tribe, American Constitutional Law s 13-20 (1978), at 781 n. 22.] In our view, the magisterial district restriction in the present case is significantly more onerous than the congressional district restrictions upheld in Udall and Moritt. Our magisterial districts are small components of our counties, which in turn form our congressional districts. Moreover, the magisterial restriction on canvassers severely inhibits their geographic mobility.

A possible State justification for the magisterial restriction contained in W.Va.Code, 3-5-23(b) and (c), is that the signature solicitor would be familiar with the voters of his magisterial district and they, in turn, would have more confidence in him than in a stranger. However, the solicitor is "certified," as we discuss in greater detail in the next section of this opinion, so that his credentials should allay any fear on the part of the voter as to his bona fides. It is doubtful whether even the solicitor residing in the magisterial district would have knowledge that a voter was qualified under our elections statute, and therefore he would rely on the voter's assertion that he was.

Substantial burdens are imposed on a third-party or independent candidate by the magisterial district restriction. The magisterial district is generally a small geographic unit and the candidate, with his solicitors localized in their own magisterial districts, is forced into a relatively immobile signature petition campaign. Since he is compelled to recruit solicitors for each magisterial district, the candidate is further hampered by a fragmented signature drive and increased costs. The

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district ...."

The relevant part of W.Va.Code, 3-5-23(c), states:

"The certificate shall be personally signed by duly registered voters ... who must be residents within the magisterial district of the county wherein such canvass or solicitation is made by the person or persons duly authorized."

restriction also hampers his solicitation in locations where citizens tend to congregate in large numbers, such as downtown areas, shopping centers, public parks and theaters, since persons congregating in those areas are rarely residents of the magisterial district in which the area or facility is located.

Finally, since the boundaries of magisterial districts are difficult to ascertain and, consequently, neither the voter nor the solicitor may be aware of the location of the boundary lines, invalid signatures may appear on the petition, further hampering the nominating drive.

In the face of these substantial burdens imposed by the magisterial district requirement, which has no counterpart with respect to regular party candidates, the State's attempt to show a compelling interest must fail.

We, therefore, conclude that the magisterial district restriction found in W.Va.Code, 3-5-23(b) and (c), cannot be justified by a compelling State interest under the Equal Protection Clauses of the State and Federal Constitutions.

IV

THE CREDENTIALS REQUIREMENT

Included within W.Va.Code, 3-5-23(b), is the requirement that a solicitor of petition signatures must "first obtain from the clerk of the county court of which such canvasser or solicitor is a resident, credentials which must be exhibited to each voter canvassed or solicited." The section further provides that "upon proper application made as herein provided," the county clerk "shall issue such credentials and shall keep a record thereof."

Relying primarily on Hynes v. Mayor of Oradell, 425 U.S. 610 (1976), the WVLP, the WVSWCC and Moriarty claim that this Code requirement violates the First Amendment to the United States Constitution. In Hynes, the Court invalidated a New Jersey ordinance which required, in material part, that a solicitor for a "Federal, State, County or Municipal political campaign or cause" notify the local police department in advance "for identification only." Disturbed by the breadth of the terms "cause" and "identification," the Court held the ordinance impermissibly vague under the First Amendment. It is significant, however, that the Hynes Court conceded that the meaning of the phrase "political campaign" was "fairly clear." . . .

The . . . statutory credentials form . . . clearly defines and limits the information that can be obtained by the official issuing the credentials. The official is entitled to be informed of the solicitor's name, post office address, precinct number and magisterial district, and the candidate's name and the office which he seeks. These are all pertinent facts narrowly confined to the actual mechanics of the petition procedure. There is no vagueness in terminology such as influenced the Court in Hynes, supra.

Hynes, and those decisions it cited, recognized that the First Amendment does not preclude a state from enacting a suitable statute:

"(To) protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." . . .

Here, the credentials requirement, a form of registration, serves a substantial State interest in assuring the integrity of the signature solicitation process. It prevents or reduces the opportunity for the bogus solicitor, promoted by adversary candidates, to reduce the pool of potential petition signers in a fraudulent petition drive, or to misrepresent himself as the candidate's supporter and then abuse the electorate by alienating them from the candidate's legitimate solicitors. . . . The utilization of such "dirty tricks" is not unknown to our campaign practices. See C. Bernstein & B. Woodward, All the President's Men 112-130 (1974).

We, therefore, conclude that the credentials requirement set out in W.Va.Code, 3-5-23, and as modified by our earlier holdings in this opinion, places no unconstitutional burden on independent or third-party candidates. It is narrow in the scope of the information required and does not contain vague terms which would permit the issuing official to do more than routinely issue the credentials.

V

DISQUALIFICATION FROM VOTING IN THE PRIMARY AND EARLY FILING DATE

W.Va.Code, 3-5-23(c), prohibits a person who signs a third-party or independent candidate's petition certificate from voting in the primary election.[14] W.Va.Code, 3-5-24, requires that the candidate must file his signature petitions no later than the day preceding the primary election. The petitioners [urge] that the combined effect of these two requirements is to create an unconstitutional burden on petitioners' attempt to solicit signatures and thereby gain ballot access. We disagree.

It must be kept in mind that these two Code provisions constitute a method for third-party or independent candidates to gain access to the general election ballot, as such candidates are not required to engage in the normal primary process as are the two major-party candidates. It is also clear, at least as to the voters in the ranks of third parties, that the petition process serves as the functional equivalent of a primary election.

In any analysis of an alleged equal protection violation in an election context, the task is to determine whether the state has imposed a significantly higher burden on the independent or third-party candidate than it has imposed on major-party candidates. See Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Thomas v. Lyons, 586 S.W.2d 711, 713-14 (Ky.1979). Even though there are constitutional limitations on state statutes governing elections, the United States Supreme Court recognized, in Storer v. Brown, 415 U.S. 724, 729-30 (1974), that:

> "It has never been suggested that (our decisions) automatically (invalidate) every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. 1, § 4, cl. 1, authorizes the States to prescribe '(t)he Times, Places and Manner of holding Elections for Senators and Representatives.' Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes...."

Storer involved a California statute which required independent candidates for Congress, inter alia, to have been disaffiliated from any political party for a one-year period immediately preceding the primary election and also not to have voted in the immediately preceding primary. It was claimed that these restrictions were an undue burden, since the independent candidate had to anticipate his candidacy at least twelve months prior to the primary, and possibly two years, if he had voted in the immediately preceding primary.

In upholding these provisions, Storer observed that:

> "Otherwise, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. [Section 6401] imposes a flat disqualification upon any candidate seeking to run in a party primary if he has been 'registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.' ..." . . .

The Court also relied on the earlier case of Rosario v. Rockefeller, 410 U.S. 752 (1973), where a New York statute imposed an eleven-month waiting period for voters who wanted to change their party affiliation. This provision was found not to be unconstitutional, as it served the valid state interest of protecting against interparty raiding.

The parallel between disaffiliation time periods for third-party or independent candidates and the time limitations for filing their signature petitions rests in the fact that in each instance, the candidate is forced to make an early decision on whether to assume third-party or independent status. This parallel was made even more explicit in Mandel v. Bradley, 432 U.S. 173 (1977), where the Court reversed a three-judge district court order declaring unconstitutional a Maryland statute which

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[14]The relevant portion of W.Va.Code, 3-5-23(c), reads:
"No person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate; ..."

required independent candidates to file their signature petitions 230 to 240 days before the general election. While the Court in Mandel declined to make an extended analysis of the issue because of the lack of sufficient facts, it did observe that the district court:

"(D)id not sift through the conflicting evidence and make findings of fact as to the difficulty of obtaining signatures in time to meet the early filing deadline. It did not consider the extent to which other features of the Maryland electoral system--such as the unlimited period during which signatures may be collected, or the unrestricted pool of potential petition signers--moderate whatever burden the deadline creates. . . . It did not analyze what the past experience of independent candidates for statewide office might indicate about the burden imposed on those seeking ballot access. Instead, the District Court's assumption that the filing deadline by itself was per se illegal--as well as the expedited basis upon which the case necessarily was decided--resulted in a failure to apply the constitutional standards announced in Storer to the statutory provisions here at issue." . . .

In Jenness v. Fortson, 403 U.S. 431 (1971), the Court was not troubled by Georgia's election law that gave third-party and independent candidates 180 days to obtain signature petitions and required that such petitions be filed by the same deadline-in June-that a regular party candidate filing in a primary must meet. ...

There are no limitations under W.Va.Code, 3-5-23, as to when a third-party or independent candidate may begin his signature petition drive. The only stricture is that the candidate's petitions must be filed the day preceding the primary election. Under W.Va.Code 3-5-7, a regular-party candidate must file his certificate of candidacy no later than "the last Saturday of March next preceding the primary election day."

Petitioners argue that our filing deadline under W.Va.Code, 3-5-24, must be deemed burdensome in light of the "second chance" provision of the Texas statute considered in American Party of Texas v. White, 415 U.S. 767 (1974). However, we do believe this case to be analogous, since the second chance statute applied only to third-party candidates who had failed to obtain the requisite voters in a rather complicated precinct convention system . . ..

Even under the second chance provision, the Texas procedure foreclosed signatures of those voters who had voted in the regular primary. We cannot help but believe that our straightforward signature petition standard is much less burdensome than the Texas precinct convention and second chance scheme.

Our provision is closely analogous to the Texas independent candidate petition statute[.] The Supreme Court characterized the attack on this statute in this fashion: "(T)he argument that the statute is unduly burdensome approaches the frivolous." . . .

In light of the filing deadline for regular-party candidates and in light of the length of time that a third-party or independent candidate has to procure the signature petitions, we do not believe that the deadline in [§ 3-5-24] constitutes an unreasonable burden, and therefore it does not violate the Equal Protection Clause of our State or Federal Constitutions.

The prohibition against a voter signing the petition of a third-party or independent candidate and then voting in the regular-party primary is contained in W.Va.Code, 3-5-23(c).[19] It must be remembered that this statute provides the method for ballot access to independent and third-party candidates for the general election in the fall. It thus serves as a primary-election bypass for such candidates. In [American Party of Texas], the Court addressed this problem in the context of a Texas statute which provided that persons who had voted in party primaries were prohibited from signing signature petitions of third-party and independent candidates following the primary election. In declining to invalidate this provision, the Supreme Court stated:

"Appellants attack this restriction, but, as such, it is nothing more than a prohibition against any

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[19]The pertinent part of W.Va.Code, 3-5-23(c), states:

"No person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate;..."

elector's casting more than one vote in the process of nominating candidates for a particular office. Electors may vote in only one party primary; and it is not apparent to us why the new or smaller party seeking voter support should be entitled to get signatures of those who have already voted in another nominating primary and have already demonstrated their preference for other candidates for the same office the petitioning party seeks to fill...." . . .

In confirmation of this point, the American Party Court made the following observation in Note 17:

"The parties have not brought to our attention any decision holding that as a constitutional matter, a State is obligated to allow a voter to vote in a party primary and sign a nominating petition. It is true that under the Georgia system in Jenness v. Fortson, supra, the State had apparently decided that its legitimate goals would not be compromised by allowing voters to sign a petition even though they have signed others and participated in a party primary. Nothing in that decision, however, can be read to impose upon the States the affirmative duty to allow voters to move freely from one to the other method of nominating candidates for the same public office. . . ." . . .

It is possible to make a practical distinction between third-party and independent candidates on the basis that a third party might be expected to field at least a partial list of state candidates, whereas the independent presidential candidate stands alone. Yet, we do not believe that this distinction can be elevated to a constitutional principle which would require a state to permit voters to retain a complete franchise in the primary for all candidates except those for whom they had signed signature petitions.

There are several sound reasons why a state may impose a restriction, such as that found in [§ 3-5-23] barring a voter from voting in his regular-party primary once he has signed a third-party or independent candidate's petition. First, even regular-party voters are often faced with a primary ballot on which their party has been unable to secure candidates to fill all offices.[20] Thus, to a certain extent, voters who sign a petition for a third party candidate run the same risk as do voters belonging to a regular party that may not field a complete slate of candidates. However, this fact does not compel the constitutional conclusion that third-party voters should be permitted to retain their right to vote in their regular-party primary.

Second, because third-party and independent signature petitions need not be filed until the day preceding the primary, election officials face the practical problem of identifying those persons who have signed a signature petition. This would be necessary under a statute that would permit the voter-signer to retain the right to vote for regular-party candidates in the primary election other than the candidates for the same office sought by the candidates whose petition he had signed.

There are, of course, two solutions to the problem. One is to constitutionally require that a state enact no statute prohibiting persons from voting in their regular-party primaries even though they have signed third-party or independent candidates' petitions. However, as we have seen in Storer and American Party of Texas, the United States Supreme Court has declined to extend this requirement under equal protection principles of the United States Constitution, and we decline to do so under the West Virginia Constitution.

The other alternative is for the State to advance the deadline for filing of the signature petitions to a time sufficiently in advance of the primary election date so that identification of the signatures can be undertaken in regard to candidates for whom the voter will be ineligible to vote in his regular-party primary. Obviously, any such system poses substantial difficulties for election officials, not only in the identification mechanics, but in transmitting this information to election officials in the precinct where the voter resides. Moreover, advancing the filing date works against the interest

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[20]In West Virginia, this has sometimes occurred in the primary of the Republican Party, which historically has been weaker than the Democratic Party in this State. In the 1980 primary election, the Republican Party did not have a state candidate for either the Office of Attorney General or the West Virginia Supreme Court of Appeals.

of third-party and independent candidates, since it reduces the time period in which they can engage in effective signature solicitation for their candidacy petitions. . . .

For the foregoing reasons, we decline to hold either W.Va. Code, 3-5-24, setting the filing date for signature petitions, or W.Va. Code, 3-5-23(c), prohibiting voters who sign such petitioners from voting in their regular-party primary, as setting an unconstitutional burden under the Equal Protection Clauses of the State and Federal Constitutions. . . .

[A brief opinion by Justice McGraw, concurring in part and dissenting in part, is omitted.]

STATE ex rel. BILLINGS v. CITY OF POINT PLEASANT,
194 W.Va. 301, 460 S.E.2d 436 (1995).

CLECKLEY, Justice:

In this original mandamus proceeding, the relator challenges the constitutionality of W.Va.Code, 3-5-7(b)(6) (1991)[.] . . .

I
BACKGROUND

The respondent, City of Point Pleasant, changed the boundaries of its wards on February 13, 1995[.] . . . Following the boundary realignment, the Republican and Democratic nominating conventions were conducted March 17, 1995, and March 20, 1995, respectively.

Prior to March, 1995, the relator was a registered Republican. In that month, he changed his affiliation to the Democratic Party and then filed his certificate of announcement to run as a Democrat for the Point Pleasant city council. The relator thus failed to comply with the sixty-day political party affiliation requirement prior to the announcement of his candidacy, as required by W.Va.Code, 3-5-7(b)(6). Michael Shaw, Chairman of the Point Pleasant City Republican Executive Committee, filed a complaint with the respondent, Marilyn McDaniel, City Clerk, seeking to remove the relator from the ballot because of his noncompliance with W.Va.Code, 3-5-7(b)(6).

. . . In anticipation of the removal of his name from the ballot by the ballot commission, the relator petitioned this Court to issue a rule to show cause directing the respondents to appear and explain why the relator and others similarly situated should not have their names placed on the ballot for the general election on May 20, 1995. The petition challenged the constitutionality of the durational party affiliation requirement in W.Va.Code, 3-5-7(b)(6). . . .

II
DISCUSSION

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B. Analysis

W.Va.Code, 3-5-7(b)(6), states, in effect, that a candidate cannot qualify to run for public office if he or she changed his or her political party affiliation during the sixty days prior to the announcement of candidacy.[4] In his petition, the relator asserts a writ of mandamus should be

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[4]W.Va.Code, 3-5-7, reads, in part:

"(b) The certificate of announcement shall be in a form prescribed by the secretary of state on which the candidate shall make a sworn statement before a notary public or other officer authorized to give oaths, containing the following information:

* * * * * *

"(6) For partisan election, the name of the candidate's political party, and a statement that the candidate is a member of and affiliated with that political party as is evidenced by the candidate's current registration as a voter affiliated with that party, and that the candidate has not been registered as a voter affiliated with any other political party for a period of sixty days before the day of filing the announcement[.]"

granted because the durational party affiliation requirement of W.Va.Code, 3-5-7(b)(6), violates his rights to run for political office and to change parties.[5] The respondents defend the statute's constitutionality and the consequent removal of the relator's name from the ballot on the ground that the law serves the compelling state interest in orderly election proceedings by preventing "party-shopping" by candidates. According to the respondents, party-shopping threatens to "confuse and baffle" and, perhaps, even defraud the voters of the City of Point Pleasant.

We agree with the relator that the West Virginia Constitution confers a fundamental right to run for public office. This right necessarily follows from several provisions. First, Article IV guarantees a right of political participation through Section 1's extension of the franchise to all adults (except those of unsound mind or under a felony conviction) and through Section 4's use of the Section 1 voter eligibility criteria to determine eligibility for public office. We, accordingly, concluded in Marra v. Zink, 163 W.Va. 400, 403, 256 S.E.2d 581, 584 (1979), that "art. 4, § 4 is the exclusive constitutional authority for the establishment of qualifications for municipal office and any qualifications in excess of the provision cannot be created by general law under authority of W.Va.Const., art. 4, § 8 nor under the Legislature's plenary law making power." In context, this limitation means the Legislature cannot go beyond the criteria in Section 4 of Article IV unless it can satisfy a compelling state interest analysis. Sturm v. Henderson, 176 W.Va. 319, 342 S.E.2d 287 (1986), superseded by constitutional amendment as stated in Adkins v. Smith, 185 W.Va. 481, 408 S.E.2d 60 (1991).

Second, a citizen's decision to run for office necessarily involves him or her in expression that lies at the very core of free speech protected by Section 7 of Article III, that is, in political speech aimed at influencing voters and shaping governmental policy. See Anderson v. Celebrezze, 460 U.S. 780 (1983); Garcelon v. Rutledge, 173 W.Va. 572, 318 S.E.2d 622 (1984). Even candidates who lose often make valuable contributions to the political process by introducing new ideas, exposing shortcomings in government, providing an outlet for intense feelings held by certain constituencies, highlighting previously understated issues, or pushing the other candidates one way or another on the political spectrum.

Third, candidates' rights are necessarily tied to voters' rights. Clearly, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on the right strike at the heart of representative democracy." Reynolds v. Sims, 377 U.S. 533, 555 (1964). A citizen's right to vote is not worth much if the law denies his or her candidate of choice the opportunity to run. "The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlating effect on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972). As the United States Supreme Court observed in Powell v. McCormack, 395 U.S. 486, 548 (1969):

> "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 Elliot's Debates, 257. As Madison pointed out at the convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."

Finally, candidacy rights necessarily implicate the freedom of association protected by Section 16

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[5]The relator also asserts the statute is unconstitutional because it creates, without a compelling state purpose, three classes of candidates: (1) candidates who have been members of their political party for more than sixty days prior to filing, (2) candidates who were members of a different political party less than sixty days before filing, and (3) candidates who have not been members of any political party within the sixty-day period. Assuming that to be a fair breakdown of the statute (which is questionable), any equal protection argument that relator's class (the second one above) is the subject of unconstitutional discrimination ultimately boils down to the same considerations and analyses as is applied to his fundamental right of candidacy argument dealt with in the text. If [§ 3-5-7(b)(6)] were applied to discriminate against independents ..., then additional constitutional concerns would be presented. ...The relator, however, lacks standing to present those concerns, and we do not address them here.

of Article III ("[t]he right of the people ... to consult for the common good ... shall be held inviolate"). Political candidacies are essentially a coming together of voters to support a particular platform, cause, or leader. Political parties, which are--for better or worse--an integral part of our democratic system, measure their success through their candidates. By limiting access to the ballot, the State necessarily constricts the opportunities of political associations not only to prevail in the electoral process, but also to participate meaningfully in it. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968); Garcelon v. Rutledge, supra.

When reviewing the constitutionality of our election laws that burden the right to vote and the right to run for public office, we must weigh "the character and magnitude of the asserted injury to the rights protected by the ... [Constitution] that the ... [relator] seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration not only "the legitimacy and strength of each of those interests," but also "the extent to which those interests make it necessary to burden the ... [relator's] right." Anderson v. Celebrezze[.] This balancing test was further clarified in Burdick v. Takushi, 504 U.S. 428, 432-36 (1992):

> "[U]nder this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' ... But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (Citation omitted).

Thus, we have consistently adhered to the conclusion stated in Syllabus Point 1, in part, of State ex rel. Piccirillo v. City of Follansbee, 160 W.Va. 329, 233 S.E.2d 419 (1977): "The right to become a candidate for the office of city council is a fundamental right ..., and the State, in order to restrict this right, must demonstrate that a compelling state interest is served by such restriction." See also Smith v. County Comm'n of McDowell County, 184 W.Va. 328, 400 S.E.2d 572 (1990); Sturm v. Henderson, supra; Garcelon v. Rutledge, supra; State ex rel. Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979); Marra v. Zink, supra.

Without doubt, W.Va.Code, 3-5-7(b)(6), restricts the rights of individuals to participate as candidates in partisan elections. In effect, it prohibits individuals from running for office for a period of sixty days after they change their political party affiliation. Thus, the respondents will not be allowed to invoke that provision to remove the relator's name from the ballot unless they can demonstrate that the temporary ban is necessary to accomplish a compelling state interest.[7]

Although we have never decided an issue relating to durational political party affiliation requirements, we have addressed the constitutionality of durational residency requirements as applied to political candidates. In Marra v. Zink, supra, we held a city charter's one-year durational residency requirement for eligibility to a city council seat violated the West Virginia Constitution because the city was unable to show a compelling governmental purpose warranted the restriction. We were unable to see how "a one year period of continuous residency ... [would be] necessary to make ... [a candidate] more familiar with ... [a] city[.]" . . . In addition, we were concerned that such local requirements would not only exclude qualified candidates, but also would exclude candidates living in areas annexed by a city.

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[7]As noted above, the relator also contends he has a right to change parties, which is hampered by W.Va.Code, 3-5-7(b)(6). We agree. As the United States Supreme Court has recognized, restrictions that limit an individual's ability to select and change his or her political party affiliation clearly implicate the speech and associational freedoms guaranteed by the First Amendment. Kusper v. Pontikes, 414 U.S. 51 (1973). But recognition of that right and of the burden placed on it by W.Va.Code, 3-5-7(b)(6), only entitles the relator to invoke the compelling state interest test. Because the relator's fundamental right to candidacy also requires use of that standard, and because we apply the standard infra, the relator's right to change political parties does not enhance his case.

On the other hand, in White v. Manchin, 173 W.Va. 526, 318 S.E.2d 470 (1984), we upheld a one-year residency requirement for a state office against a federal equal protection challenge.[8] Noting that a majority of jurisdictions have upheld such requirements when imposed at the state level, we recognized the requirements promoted three state interests that, collectively or separately, reached the compelling level: (1) "candidate familiarity with the needs and problems of the people to be represented"; (2) "voter familiarity with the character, intelligence, and reputation of the candidates"; and (3) "precluding frivolous or fraudulent candidacies by those who are more interested in public office than in public service." . . . Marra is distinguishable from White because we found in White that the complexity of state-level politics provided a greater justification for durational residency requirements than could be found at a local level. . . . In addition, the State's interest in thwarting political carpetbaggers is considerably greater regarding such offices as the State Legislature (as in White) than it is in the case of municipal offices (as in Marra).

Although Marra and White reached opposite conclusions about the constitutionality of the particular durational residency requirements they addressed, we believe their analyses and results were consistent. Those cases instruct us that the application of the compelling state interest standard requires a searching examination of the State's rationales for any restriction on the right to candidacy. Additionally, the selection of the compelling state interest analysis is not the end result. Application of the analysis in the context of the electoral process must recognize that the Legislature, as well as the judiciary,[9] has a role to play in ensuring the process retains its integrity and functions as an accurate reflection of the people's will. The analysis often requires courts to make some delicate distinctions, but that is perhaps an unavoidable effect of dealing with sensitive rights set in a highly regulated context.

Turning specifically to the constitutionality of durational affiliation laws, we note a significant majority of courts considering them have upheld the laws on the basis they promote political stability, preserve party integrity by discouraging party-raiding, and prevent voter confusion. See, e.g., American Party of Texas v. White, 415 U.S. 767 (1974)[.] . . .

The interest of the State "in the stability of its political system" is "not only permissible, but compelling[.]" Storer v. Brown, 415 U.S. 724, 736 (1974). In Storer, the United States Supreme Court upheld a California statute requiring independent candidates to be disaffiliated with a "qualified political party" for one year preceding any primary election. The Supreme Court sustained the statute because it furthered the important state interests in maintaining the integrity of the electoral process and preventing factionalism. "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." . . . Because the durational affiliation requirement promoted--rather than detracted from--the purity and fairness of the democratic process, there was no need for judicial intervention and invalidation of the law. . . .

Similarly, state courts have upheld the constitutionality of a requirement that candidates be affiliated with a political party for a certain period prior to seeking nomination or election. In Ray v. Mickelson, 196 Colo. 325, 327, 584 P.2d 1215, 1217 (1978), for example, the Supreme Court of Colorado affirmed an order declaring ineligible a candidate who failed to meet the statutory requirement that he must have been a member of the political party he sought to represent for at least twelve months prior to his nomination. A Florida appellate court in Polly v. Navarro, 457 So.2d 1140, 1143 (Fla.App.1984), adopted the Storer analysis and rejected a constitutional challenge to a

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[8]In White, no argument could have been made under the West Virginia Constitution because the requirement at issue--that State senators must reside in their districts for at least one year prior to their election-- was imposed by Section 12 of Article VI of the West Virginia Constitution.

[9]See generally John H. Ely, Democracy and Distrust (1980).

statute that disqualified any person who had been a candidate for nomination for a different political party within the six months preceding the general election. The Polly court concluded the law clearly served "the governmental interests of maintaining the integrity of different routes to the ballot and of stabilizing the political system[.]" . . . See also Davis v. State Election Bd., 762 P.2d 932 (Okla.1988) (upholding six-month disaffiliation requirement for independent candidates); State ex rel. Graham v. Board of Elections, 60 Ohio St.2d 123, 14 O.O.3d 349, 397 N.E.2d 1204 (1979) (applying statutory prohibition against candidacy where candidate voted as member of different political party within the preceding four calendar years).[10]

As noted above, the prevention of "party-raiding" is also frequently cited as a compelling justification for party affiliation statutes. For example, in Lippitt v. Cipollone, 337 F.Supp. 1405, 1406 (N.D.Ohio 1971), aff'd mem., 404 U.S. 1032 (1972), the district court upheld a statute that permitted the disqualification of candidates who voted as members of different political parties at any primary election in the preceding four calendar years. Lippitt explained:

> "The compelling State interest the Ohio Legislature seeks to protect ... is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '... altering their political party affiliations for opportunistic reasons.' . . ." . . .

In light of the consistent results reached by the above authorities, from the United States Supreme Court as well as state and lower federal courts, we conclude the State's interests in preserving the integrity of the political process and in preventing party raiding and voter confusion rise to the compelling level. Furthermore, we find those interests are put at risk by candidates who skip from one party to another just prior to an election campaign to take advantage of a political opportunity. Our analysis does not end there, however. We will still not uphold W.Va.Code, 3-5-7(b)(6), if there is a less restrictive means of satisfying legitimate state goals. As indicated by the United States Supreme Court in numerous cases: "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." Kusper v. Pontikes, 414 U.S. 51, 59 (1973). See also Shelton v. Tucker, 364 U.S. 479, 488 (1960). Therefore, unduly restrictive election laws, even if based on compelling governmental purposes, are unconstitutional.

In the present case, the relator has not suggested nor have we found a less restrictive method for the State to address the problems caused by candidate party-switching and to satisfy its legitimate goals of protecting the election process and maintaining party integrity. The sixty-day party affiliation requirement, short in comparison to those upheld in other cases, focuses precisely on that political opportunism which is most likely to threaten the State's interests,[12] i.e., on party switches

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[10]We approvingly cite these cases only to the extent they recognize that durational affiliation requirements promote compelling state interests. In doing so, we imply no endorsement of the constitutionality of the length of the particular durational periods at issue in the cases.

[12]Courts that have invalidated durational affiliation requirements have done so only because the statute either discriminated against independent candidates, McCarthy v. Austin, 423 F.Supp. 990 (W.D.Mich.1976), or imposed an unduly severe restriction. Kay v. Brown, 424 F.Supp. 588 (D.C.Ohio 1976) (four-year disqualification was unnecessarily burdensome and therefore unconstitutional). . . .

Although courts are reluctant to draw lines of unconstitutionality across classifications that run along a continuum, see, e.g., United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 182-98 (1980) (Brennan, J., dissenting), such line drawing is often unavoidable in election cases. E.g., compare Dunn v. Blumstein, supra (one-year durational residency requirement was unconstitutional as a penalty on the right to travel and a deprivation of the right to vote), with Marston v. Lewis, 410 U.S. 679 (1973) (fifty-day closing period for voter registration prior to an election was necessary for administrative purposes and was, therefore, constitutional even though it barred newly arrived residents from voting); compare Williams v. Rhodes, supra (ballot access requirement that third party candidates submit petitions with signatures of registered voters totaling 15 percent of the number of votes cast in preceding election was unconstitutional) with Jenness v. Fortson, 403 U.S. 431 (1971) (requiring third party candidates seeking to qualify for the ballot to submit petitions with signatures totaling 5 percent of those eligible to vote in the last election was constitutional).

that occur just before an election campaign when the candidacy openings suddenly appear and the public's ability to assess changes in affiliation is reduced by time constraints and other election news. Moreover, none of the reasons advanced in the relator's petition justify his failure to change his party affiliation in time to allow him to run as a Democrat. Finally, the relator can run for office in any future election in the State, so long as he either runs as a Democrat or changes his political party before the sixty days preceding his candidacy announcement.

III.

CONCLUSION

For the foregoing reasons, we hold that W.Va.Code, 3-5-7(b)(6), is valid under both the United States Constitution and the West Virginia Constitution. Accordingly, the writ of mandamus is denied. . . .

BROTHERTON, J., did not participate.

FOX, J., sitting by temporary assignment.

NOTE

Wells v. State ex rel. Miller, 237 W. Va. 731, 791 S.E.2d 361 (2016), applied the *Anderson v. Celebrezze* analysis in rejecting a constitutional challenge to the Court's interpretation of West Virginia Code § 3-5-23 that precluded a registered Democrat from qualifying for the general election election as an independent candidate. The Court concluded that the State's interest in maintaining electoral integrity and preventing voter confusion justified the exclusion.

In this case, we need only decide whether the sixty-day period in W.Va.Code, 3-5-7(b)(6), is on the valid side of the line of constitutionality that crosses the spectrum of durational affiliation requirements. We believe the Legislature properly focused on the most critical period of time, and the sixty-day requirement is necessary to protect the State's interests. Thus, we are not called upon here to determine precisely where on the spectrum the line of constitutionality must be drawn. Of course, the longer the durational disqualification extends the more difficulty the State has in demonstrating its necessity.